

Ct. App. No. 52535-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

Bruce Bennett,  
Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAMANIA COUNTY

The Honorable Randall C. Krog, Judge

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APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS, RAP 10.10

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1. IDENTITY OF APPELLANT

I, Bruce L Bennett, am the appellant identified above. On December 6, 2018, my attorney, Lise Ellner, filed a brief on my behalf arguing one issue. On December 12, 2018, I filed a lawful request asking for my REPORT OF PROCEEDINGS pursuant to RAP 10.10(e). As of January 2, 2019, I still have not received said reports. I have an on-going need for said proceedings as I may soon become a pro se litigant.

In this STATEMENT OF ADDITIONAL GROUNDS, I am filing one issue distinctly different from the issue raised by my attorney. The REPORT OF PROCEEDINGS is necessary to support my argument, required to establish the Washington sentencing judge's clear acknowledgment that the Oregon trial court (the court of original jurisdiction) treated my prior offenses as a SINGLE CRIMINAL EPISODE for sentencing purposes, the Washington court stating, "I don't have to do what another court did". This was pertaining to ARGUMENT C, at my resentencing, expressly argued in DEFENDANT'S MOTION AND PRELIMINARY ARGUMENT FOR RESENTENCING, Skamania County Cause No. 93-1-00102-7, Dated August 1, 2018.

I, Bruce Bennett, am now filing this STATEMENT OF ADDITIONAL GROUNDS, pursuant to RAP 10.10, without receiving my REPORT OF PROCEEDINGS because I am afraid the appellate court will not review my issue if not timely filed.

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## 2. GROUND FOR REVIEW

THE SENTENCING COURT USED AN UNCONSTITUTIONALLY VAGUE STATUTE TO INCREASE THE APPELLANT'S CRIMINAL HISTORY SCORE BY REQUIRING THE APPELLANT TO PROVE IMPOSSIBLY AMBIGUOUS CRITERIA IDENTIFIED IN WASHINGTON'S SAME CRIMINAL CONDUCT ANALYSIS FOR PRIOR CONVICTIONS. RCW 9.94A.360(6)(a) (recodified as RCW 9.94A.525(5)(a)(i)). This is a violation of due process. Fourteenth Amendment.

## 3. ARGUMENT

The appellant has three prior convictions from Oregon in 1991: Burglary 1, Kidnap 1, and Kidnap 1. The Washington sentencing court counted these prior offenses as Separate Criminal Conduct, resulting in an offender score of 8 points; however, these prior convictions were proven to an Oregon jury, beyond a reasonable doubt, to have occurred at the same time, same place, with the same intent, and with the same victim regarding one kidnap and the burglary. Also, these three prior convictions were charged, tried, and sentenced as being a SINGLE CRIMINAL EPISODE under Oregon law. ORS 131.505 to 131.525:

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Definitions for ORS 131.505 to 131.525

(4) Criminal episode means continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed toward the accomplishment of a single criminal objective.

<http://www.oregonlaws.org/org/131.505>

In Washington, when a trial court calculates an offender score, the court must address whether any prior offenses constitute the same criminal conduct under RCW 9.94A.525(5)(a)(i). This process involves two parts: Firstly, if the court of original jurisdiction had found the prior convictions to encompass the same criminal conduct, that prior determination is binding. *State v Valencia*, 2 Wn. App. 2d 121 (2018) citing *State v Johnson*, 180 Wn. App. 92, 102-103, 320 P. 3d 197 (2014); otherwise, the trial court must apply the SAME CRIMINAL CONDUCT ANALYSIS to the prior offenses, applying the following criteria: same time, same place, same intent, and same victim.

The criteria defining Same Criminal Conduct are vague, resulting in arbitrary (or broadly "discretionary") enforcement. In the case at hand, there is no consensus between the Oregon court's and the Washington court's definitions. There is no clear definition of what the appellant/defendant must establish in order to prove Same Criminal Conduct, and there is no codification anywhere of what evidence meets that burden.

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Under The United States Constitution, a law or regulation that does not provide fair warning of what it requires is void as unconstitutionally vague. United States v L. Cohen Grocery Co., 255 U.S. 81, 89-91, 41 S. Ct. 298, 65 L. Ed 516 (1921). The "vagueness doctrine" protects procedural due process by ensuring laws provide notice and clear standards to prevent arbitrary enforcement. In re Det. of M.W. v Dep't of Soc. & Health Services, 185 Wn. 2d 633 (2015).

In State v Graciano, 176 Wn. 2d 531 (2012), the Washington Supreme Court held that it is the state's burden to prove the EXISTENCE of prior convictions, but it is the defendant's burden to prove SAME CRIMINAL CONDUCT, two distinctly separate burdens, and, therefore, two distinctly separate facts affecting the defendant's sentence.

In preparation for resentencing, in August of 2018, the appellant filed his Graciano argument in the Skamania County Superior Court: DEFENDANT'S MOTION AND PRELIMINARY ARGUMENT FOR RESENTENCING, Argument C, Pages 10-18. The appellant provided exhibits with that motion, including the Oregon JUDGEMENT OF CONVICTION AND SENTENCE (exhibit 1) and the Oregon Indictment (exhibit 4). The Oregon indictment clearly defines the prior convictions as occurring at the same time, same place, with the same intent, and same victim. The Oregon JUDGEMENT OF CONVICTION AND SENTENCE irrefutably identifies the prior convictions as being a SINGLE CRIMINAL EPISODE: see the Criminal History

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Classification "I" on page one of the Oregon sentencing document. This SINGLE CRIMINAL EPISODE statute is used in Oregon for exactly the same purpose of SAME CRIMINAL CONDUCT in Washington, to establish a sentencing score on a sentencing grid.

Oregon's sentencing guidelines grid (OAR 213-004-0001) functions almost identically to Washington's sentencing grid. Each grid has a vertical axis designating crime seriousness, and each grid has a horizontal axis determining criminal history. In Washington, if multiple current offenses encompass the Same Criminal Conduct, then none of those offenses will increase the offender score. The same is exactly true in Oregon. See *State v Bryant*, 245 Or. App. 519, 263 P. 3d 368, 369 (2011) citing The Bucholz Rule (Oregon Administrative Rule 213-004-0006(2)); see also *State v Norman*, 216 Or. App. 475, 174 P. 3d 598, 604:

[a] defendant's **criminal history score** is used to calculate the sentence the court is to impose. OAR 213-004-0006. The score is determined by several factors, including the number and character of the offender's prior convictions. ID. When multiple convictions occur in the same proceedings, ones occurring in an earlier **criminal episode** may be used to recalculate the defendant's **criminal history score** with respect to convictions stemming from a later **criminal episode**. [emphasis added]. *State v Bucholz*, 317 Or. 309, 317, 855 P. 2d 1100 (1997). In contrast, when a defendant's multiple convictions stem from the same criminal episode, his criminal history remains the same with respect to all of those convictions.

In August of 2018, when the appellant was attempting to meet his Graciano burden in the Skamania County Superior Court, the

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court clearly acknowledged the appellant's preliminary motion and exhibits. The sentencing court stated, "good argument", but "I don't have to do what another court did". RP \_\_\_\_\_. When the appellant objected, arguing that the Washington sentencing court did not accurately understand the Oregon sentencing document, the Washington court acknowledged its understanding that "The Oregon court treated the offenses as a single criminal episode". RP \_\_\_\_\_.

The Oregon documents, from indictment to jury forms to the JUDGEMENT OF CONVICTION AND SENTENCE, all factually prove the same time, same place, same intent, and same victim for one kidnap and the burglary. The Washington prosecutor was allowed to use these documents to prove the EXISTENCE of the appellant's prior convictions, which met the state's Graciano burden, but the appellant was not enabled to use the exact same documents to prove his Graciano burden of Same Criminal Conduct. This begs the questions: What exactly does Washington's Same Criminal Conduct law require a defendant/appellant to prove, and what evidence can be used?

There is no clear standard as to how courts are to apply the Same Criminal Conduct Analysis for prior convictions. It's inescapable that Washington sentencing courts are engaging in arbitrary semantics when determining Same Criminal Conduct, and this violates the vagueness doctrine, a violation of due process

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especially prejudicial to defendants in that it results in prison sentences based on potentially unreliable or false information.

Any facts relevant to sentencing must be reliable, otherwise, the entire sentencing procedure is invalid as a violation of due process. State v Ford, 137 Wn. 2d 472, 481, 973 P. 2d 452, 456-57 (1999):

Information relied upon at sentencing "is 'false or unreliable' if it lacks 'some minimal indicium of reliability beyond mere allegation'." United States v Ibarra 737 F. 2d 825, 827 (9th Cir. 1984)(emphasis added)(quoting United States v Baylin, 696 F. 2d 1030, 1040 (3rd Cir. 1982)). See also United States v Ward, 68 F. 3d 146, 149 (6th Cir. 1995); United States v Fatico, 458 F. Supp. 388, 397-98 (E.D.N.Y. 1978)(misinformation, misunderstanding, or materially false assumptions "as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process")(quoting United States v Malcom, 432 F. 2d 809, 816 (2d Cir. 1970), aff'd, 603 F. 2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073, 100 S. Ct. 1018, 62 L. Ed. 2d 755 (1980)).

#### Multiple points of Washington's Same Criminal Conduct

Analysis for prior convictions violates the vagueness doctrine

Firstly, what exactly is meant by the "same time"? Does this mean literally a temporally simultaneous action, inseparable, or can a single second elapse between two actions? Can five seconds elapse? One minute? How does Oregon's definition of "same time" differ from Washington's?

Secondly, what exactly is meant by the "same place"? Does Washington's statute mean to literally and simultaneously occupy the same three dimensional space, or can a few inches be traveled

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during a two second elapse in time? Can one foot be traveled? Ten feet? In the case at hand, the Oregon courts (and jury) apparently have a different definition of same place than does the Washington sentencing court.

Thirdly, what exactly is meant by "same intent"? Can "intent" be broken down into mental states taking place in single second intervals? Foot steps? Hand movements? In the course of a burglary, does intent change in the course of reaching for the doorknob and taking hold of the doorknob? Is turning the doorknob, pushing the door open, and stepping over the threshold considered three separate intents? Does intent change if a defendant's original purpose of traveling to the door was to enter the door and steal something from inside the door, or does intent remain the same throughout the duration of preplanned deliberate activity?

Forthly, though "same victim" seems to be the most unambiguous term of the SAME CRIMINAL CONDUCT analysis, the Washington and Oregon courts apparently do not arrive at a consensus in the current case. Regarding the appellant's prior Oregon convictions, one kidnap victim and the burglary victim are literally the exact same person. The Washington court has chosen to define these two crimes as Separate Criminal Conduct contrary to the original trial court's findings of SINGLE CRIMINAL EPISODE, even though the two statutes share the exact same sentencing purpose and virtually identical criteria.

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Finally, and ultimately, who is responsible for defining these terms that have such an enormous effect on individual sentences? Must the legislature define these terms, or are sentencing courts granted discretion and broad latitude in designing these definitions? Are courts statutorily permitted to have widely differing definitions depending on different judges or different cases? Can the definitions vary depending on a sentencing judge's mood or a defendant's remorse? Is there a location where these legal definitions can be read, codified, or even objectively understood equally by all parties in a single court action?

In the case at hand, *State v Graciano, supra*, requires the appellant to prove ambiguous criteria, in effect disabling the defendant from establishing a consensus between the original trial court and the current Washington sentencing court. The criteria in the SAME CRIMINAL CONDUCT ANALYSIS are vague, lacking an objective codification of definitions enacted by Washington's two legislative bodies. The appellant is required to prove impossibly vague criteria that have an enormous impact at sentencing, vague criteria distinctly separate from the validity of prior conviction existence. It is clear that "ordinary minds" cannot find an objective understanding of the listed criteria.

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#### 4. CONCLUSION

Washington's SAME CRIMINAL CONDUCT ANALYSIS for prior convictions is not intended to prove the EXISTENCE of prior convictions, and the criteria have an enormous impact on a defendant's sentence; therefore, the unconstitutionally vague criteria must be lawfully defined and proven beyond a reasonable doubt to a jury. Apprendi v New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed 2d 435 (2000).

The appellant respectfully requests to have his sentence reversed and remanded with instructions for the sentencing court to either: 1) Honor the Oregon court's documents and merge the prior convictions for offender score purposes; or 2) Lawfully define and clearly articulate the appellant's SAME CRIMINAL CONDUCT burden enforced via Graciano, and submit the questions of fact to a lawfully empanelled jury to be proven beyond a reasonable doubt.

I, BRUCE L BENNETT, SWEAR AND DECLARE UNDER THE PAINS AND PENALTIES OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 2nd day of January, 2019.

  
Bruce Bennett  
Appellant

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IN THE COURT OF APPEALS OF WASHINGTON

DIVISION II

Declaration Of Service By Mailing

I, Bruce Bennett, SWEAR AND DECLARE that I deposited the following documents into the U.S. Mail, postage prepaid, on January 2, 2019: Appellant's STATEMENT OF ADDITIONAL GROUNDS, and Declaration Of Service By Mailing. I, Bruce Bennett, also SWEAR AND DECLARE that three (3) said envelopes were addressed as follows, and each contained copies of the documents identified above: Ct. App. No. 52535-6-II

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I, BRUCE BENNETT, SWEAR AND DECLARE UNDER THE PAINS AND PENALTIES OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FORGOING IS TRUE AND CORRECT.

DATE this 2nd day of January, 2019.

Bruce Bennett  
Bruce Bennett  
Appellant